IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3609 OF 1997

SMT. GANGUBAI MUNESHVAR MAGAJI)
occupying a room in Pathare House
L. T. Road, Dahisar (W) Bmbay-68) .. PETITIONER

Versus

L. B. PATHARE)
residing at Dahisar West)
Bombay-68) .. RESPONDENT

Mr. V. R. Sutrale for petitioner
Mr. G.V. Murti with Ms. Mamta Shah for respondent

CORAM: SMT. RANJANA DESAI, J.
25/8/05

JUDGMENT:

. The petitioner is the original defendant-tenant. The respondent is the original plaintiff-landlord. The plaintiff filed a suit being R.A.E. & R No. 2043 of 1976 in the court of Small Causes Court at Bombay under Section 12(2) of the Bombay Hotels & Lodging Rent Control Act, 1947 ("the Rent Act" for short) for possession of the suit premises on the ground of default in payment of arrears of rent.

2. At the trial the case of the plaintiftf was that

plaintiff is the owner and landlord of the house property known as Pathare House situated at L. T. Road, Dahisar (W) Mumbai. In the month of January, 1952, one room in the said Pathare House was let out to the defendant on monthly rent of Rs.14/- per month exclusive of electric charges and water charges. The defendant is occupying the suit premises for the last about 24 years. According to the plaintiff the defendant failed and neglected to pay the rent since the inception of the tenancy i.e. from the date the suit premises were let out to her.

3. By notice dated 30th January, 1976, the tenancy of the defendant was terminated by the plaintiff. By this notice the plaintiff also demanded the arrears of rent. However, the defendant neither paid the arrears of rent nor vacated the suit premises and, therefore, plaintiff had to file the instant suit for recovery of possession of the suit premises on the ground of arrears of rent for a period of three years preceding the date of the suit. The said claim is within the period of limitation.

4. The defendant resisted the suit and filed a written statement wherein she denied that she was in arrears of rent for the period as claimed by the plaintiff. She disputed the legality of the demand notice. She contended that the agreed rent was

Rs.14/- per month but inclusive of water charges and electric charges. She further contended that she has paid the rent regularly but no rent receipts were issued by the plaintiff. According to her she had paid the amount in cash till end of May, 1975. Thereafter she sent the money order in respect of arrears of rent covering the period from January, 1975 to November, 1975. The defendant refused to accept the money order. The money order was received back.

5. According to the defendant the electric supply in the suit premises was disconnected by the plaintiff. Therefore, she served a notice on the plaintiff dated 1/1/76 putting forth her grievance. According to the defendant as a counterblast to this notice the plaintiff terminated her tenancy and filed the suit. It is the case of the defendant that she was always ready and willing to pay the rent on the date of the suit. On the date of the suit she has already paid rent till end of May, 1975 and in the circumstances she prayed that the suit be dismissed.

6. In support of his case, the plaintiff examined himself. The defendant also stepped in the witness box. She relied on the evidence of one Jairam Devraj Shastri. The parties also relied on documentary evidence.

7. After perusing the evidence on record the trial court came to a conclusion that the agreed rate of rent was Rs.14/- per month exclusive of electric charges and water charges. The trial court held that the plaintiff had failed to prove that the defendant was in arrears of rent from June to November 1975, and also held that the defendant was in arrears of rent only for a period of one month. The trial court recorded a finding that the defendant had proved that she was ready and willing to pay the rent and the defendant was still willing to pay the rent of the suit premises. In view of this, the suit came to be dismissed.

8. The plaintiff carried an appeal to the appellate Bench of the Small Causes Court being Appeal No. 10 of 1993. The lower appellate court by its judgment and order dated 4/2/97 reversed the trial court's judgment. The lower appellate court held that the plaintiff had proved that the defendant was in arrears of rent for more than six months from the date of the demand notice; that the defendant had failed and neglected to comply with the demand notice within one month as contemplated under the Rent Act and that the plaintiff was entitled for a decree under the Rent Act. In view of this finding the lower appellate court allowed the plaintiff's appeal and decreed the suit under Section 12(3)(a) of the Rent Act. The said

judgment and order is challenged in this writ petition.

9. I have heard at considerable length Mr. Sutrale the learned counsel appearing for the petitioner. Mr. Sutrale contended that the lower appellate court fell into a grave error when it reversed the well reasoned judgment of the trial court. He contended that from the evidence on record it is amply clear that the plaintiff had failed to prove that the defendant was in arrears of rent from the inception of tenancy i.e. from 1/1/52. He submitted that apart from bare words of the plaintiff there is nothing on record to establish this fact. The plaintiff has admitted in his evidence that he has not maintained any record of tenancy. In fact the plaintiff was not issuing rent receipts and hence the defendant could not have produced any receipts to show that she had paid the rent. The learned counsel pointed out that it is an admitted fact that the defendant had sent money order to the plaintiff which the plaintiff refused to accept. He submitted that the arrears of rent for the period June 1975 to November, 1975 were sent by money order and the plaintiff having refused to accept the said payment, it must be held that there was deemed payment of the rent.

10. The learned counsel urged that the plaintiff’s

case that for 24 years he allowed the defendant to stay in the premises without paying rent is inherently improbable. He contended that in a city like Bombay no one would allow a person to stay in his premises for such a long period without making any payment. This story, therefore, contends Mr. Sutrale deserves to be rejected.

11. Mr. Sutrale contended that since the defendant remitted the rent by money order for the period from June 1975 to November, 1975 on the date of suit notice dated 13/1/76, the defendant was in arrears of rent only for a month i.e. December 1975 and the finding recorded by the trial court in that behalf is unassailable and the lower appellate court was wrong in interfering with it. The learned counsel urged that since the defednant was in arrears of rent for only one month, the judgments relied upon by the lower appellate court would not be applicable to the present case.

12. The learned counsel drew my attention to the judgment of this court in Suka Ishram Chaudhari v. Jamnabai Ranchodas Gularathi & Ors., AIR 1972 BOMBAY 273 where this court has held that if a landlord refuses to accept rent sent by money order the tenant cannot be said to be in arrears of rent nor can the tenant be said to be not ready and willing to pay

rent.

13. The learned counsel also relied on Shantilal Jaywantrai & Ors. v. Rampal Shivram Varma, 1992 Mah. RCJ 173 wherein this court has held that if the landlord refuses rent sent by money order, the money order coupon bearing endorsement of refusal produced before the court can be held to be a legal tender.

14. Mr. Sutrale contended that the defendant is a poor lady. She is a senior citizen and is not keeping good health. He submitted that the defendant is prepared to pay all the arerars of rent in the court and the court may take a kindly view of the matter. Mr. Sutrale sought to bring on record certain documents which according to him indicate that the Assistant Municipal Commissioner, Dahisar had sent a letter dated 4//11/04 to the plaintiff about the dilapidated condition of the suit premises and the plaintiff had addressed some letters to the defendant saying that he will carry out the repairs. Mr. Sutrale wanted to point out from this correspondence that it is the plaintiff who had asked the defendant not to make any payment for repairs and, therefore, the defendant has not made any payment. He submitted that in the peculiar facts and circumstances of this case, therefore, this court should set aside the impugned judgment and order of the appellate court.

15. I have also heard Mr. Murti, the learned counsel for the respondent at considerable length. He submitted that the judgment of the lower appellate court cannot be characterised as perverse warranting interference with it in writ jurisdiction. The learned counsel submitted that the evidence on record clearly indicates that the case of the plaintiff clearly falls under Section 12 (3)(a) of the Rent Act. Relying on the judgments of the Supreme Court in Shah Dhansukhlal Chaganlal v. Dalichand Virchand Shroff, AIR 1968 SC 1109, Jaywant S. Kulkarni & Ors. v. Minocher Dosabhai Shroff & Ors., 1988, Bom. C.R. 531 and a judgment of this court in Gokuldas Jamnadas v. Ahamedmiya Sarole, 1992 Bom. C.R. 158, the learned counsel contended that the case of the defendant squarely falls under Section 12(3)(a) of the Rent Act and not under 12 (3) (b) thereof, and the eviction decree is, therefore, rightly passed and does not deserve to be interfered with.

16. I have carefully considered the submissions advanced by both the learned counsel.

17. The case of the defendant is that she has paid the arrears of rent from June 1975 to November, 1975. It is necessary to see how far this statement is borne out by the evidence as well as by the pleadings.

18. It is pertinent to note that in her evidence the defendant has not stated that the rent was paid upto a particular month. Her case is belied by the contradictory statements made by her in her letter and her written statement. In the letter dated 1/1/76 she has stated that she paid rent by money order for the period June 1975 to November, 1975 meaning thereby that she had paid rent upto May, 1975. However, in the written statement she has stated that the money order was sent for the period 1/1/75 to 30/11/75 @ Rs.14/- per month but the money order was not accepted. At some stage in the written statement it is averred that the defendant has rightly said in her letter that the rent was paid upto May 1976. All this is sought to be explained away as mistakes. Since the plaintiff's suit is for possession on the ground of arrears of rent, the period of arrears assumes importance and the defendant must specifically and unambiguously state for which period the rent was paid. The errors committed in giving the exact period cannot be explained away as mistakes. Indeed if there were mistakes then the mistakes ought to have been corrected at the right time by carrying out necessary amendment. These contradictory statements do make a dent in the defendant's case that she has paid the rent from June 1975 to November, 1975.

19. The case of the plaintiff as set out in his evidence is that he refused to accept the amount by money order because money order was not for the entire arrears of rent due from the defendant and demanded by him. It is not necessary to go into this aspect of the matter in view of the settled position of law in this behalf. It is an admitted fact that the defendant did not send any reply to the notice; that in response to the notice the defendant did not pay the arrears of rent and the defendant did not make any standard rent application. In this connection I may refer to Shah Dansukhlal’s case (supra). In this case the Supreme Court was dealing with Section 12(3)(a) and (b). While considering the question as to when a tenant can be said to be ready and willing to pay, the Supreme Court observed as under: "It appears to us that there is no substance in the contention put forward on behalf of the appellant. Section 12 (1) must be read with the Explanation and so read it means that a tenant can only be considered "to be ready and willing to pay" if before the expiry of the period of one month after notice referred to in sub-section (2) he makes an application to the court under sub-section 3 of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified by the Court. We have already noted that the tenant made no payment within the period of one month of the notice of ejectment and although in his written statement he

raised a dispute about the standard rent he made no application in terms of Section 11(3) of the Act. The readiness and willingness to pay has therefore, to be judged in the light of the facts of the case. Where as here a suit is filed on the ground that the tenant was in arrears for a period of more than 6 months and although raising a dispute as to the standard rent or permitted increases recoverable under the Act, the tenant makes no application in terms of Section 11(3) he cannot claim the protection of Section 12 (1) by merely offering to pay or even paying all arrears due from him when the court is about to pass a decree against him."

20. In Jaywant Kulkarni's case (supra) the Supreme Court was again dealing with the same question. The Supreme Court considered Section 12(3)(a) & (b) and referred to its earlier judgment in Harbanslal Jagmohandas's case AIR 1976 SC 2005 and quoted the observation of the Supreme Court in that case that under Section 12 of the Rent Act the landlord is not entitled to recover possession of the premises so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases. Section 12(2) provides that no suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent until the expiration of one month next after

notice in writing of the payment of the standard rent. The Supreme Court held that sub-section (3)(a) of section 12 categorically provided that where the rent was payable by the month and there was no dispute regarding the amount of standard rent or permitted increases, if such rent or increases were in arrears for a period of six months or more and the tenant neglected to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession.

21. The learned Single Judge of this court had an occasion to deal with this question in Gokuldas Jamnadas's case (supra) Referring to several decisions on the point the learned Single Judge observed as under:-

"Section 12 (3) (b) of the Act was not applicable to a case where application for fixation of standard rent is not made by the tenant within one month from service of the notice of demand and arrears of rent on the date of notice were for a period of six months or more. Section 11(3) of the Act cannot be invoked in a case where application for fixation of standard rent is not made within one month from the service of notice of demand under Section 12(2) of the Act. Readiness and willingness of the tenant to pay the

amount of arrears of rent is liable to be judged by the Court by addressing itself to the question as to whether the tenant tendered the amount of rent which was lawfully due within notice period and as to whether the tenant made an application for fixation of standard rent within one month from the service of the notice and deposited the amount of arrears and recurring rent in accordance with the orders which may be passed on such an application within the contemplation of later part of Explanation 1 to Section 12 of the Act. Section 12(1) of the Act has no application to a case where the matter squarely fall under Section 12 (3)(a) of the Act."

22. It is, therefore, clear that once the landlord disputes that the tenant has paid the arrears of rent and says that the tenant is in arrears a tenant can be considered to be ready and willing to pay the rent if before the expiry of a period of one month after the notice is served on him, he tenders the amount of rent or makes an application to the court within one month for fixation of standard rent. Admittedly in this case the defendant has not paid arrears, after notice was rereceived. In fact the defendant has not replied to the notice. In my opinion the ratio of the above judgment is clearly attracted to the facts of this case.

23. The basic contention of the petitioner is that the landlord refused to accept the rent though the petitioner was ready and willing to pay it. Money orders were refused. Therefore, the tenant must be deemed to be ready and willing to pay the rent and no decree of eviction can be passed on that ground. To substantiate this contention the judgments of this court in Suka Ishram's case and Shantilal's case were relied upon. But the petitioner cannot draw any support from the judgments because similar contentions were raised before the Supreme Court in Jaywant Kulkarni's case (supra) and the Supreme Court rejected them. It was argued that the tenant had offered to pay the rent to the landlord. The tenant's case was that the landlord was not giving receipts and by his malafide act was preventing the tenant from performing his obligation. The Supreme Court did not accept this submission and in view of it's earlier decision in Harbanslal's case held that the tenant was liable to be evicted. This later judgment of the Supreme Court pointed in Jaywant Kulkarni's case could obviously have not been pointed out to this court in Suka Ishram's case. In Shantilal's case this court has placed reliance on Suka Ishram's case and the attention of this court was not drawn to Jaywant Kulkarni's case. The judgments in Suka Ishram's case and Shantilal's case, therefore, do not help the

petitioner.

24. So far as the request for taking documents on record regarding the dilapidated condition of the suit premises and the offer made by the landlord that he will repair the suit structure is concerned, the documents are sought to be tendered in the court today when the writ petition is posted for judgment. At such belated stage the documents cannot be taken on record. In any case all that could be gathered from the submissions made by Mr. Sutrale is that the landlord allegedly told the tenant that he would carry out the repairs.

25. One important aspect of this case needs to be stated. The appellate court decided the matter on 4/2/97. It is significant to note that the last payment was made by the defendant was on 25/9/92. The trial court dismissed the suit on 10/10/92. The defendant did not tender rent in the court. The appellate court decided the matter on 4/2/97. Interim order staying the execution of the decree was passed on 18/8/97 on condition that the arrears would be paid by the defendant. However, the arrears were not paid. The defendant took out civil application No. 6492/97 for condonation of delay in tendering rent in the court. That civil application was not prosecuted. It

was dismissed for default. Civil Application No. 2215/04 was filed on 23/1/98 by the plaintiff for expeditious hearing of the petition. Admittedly till date the defendant has not tendered the arrears of rent in this court. This conduct of the defendant disentitles her from any relief even on humanitarian grounds.

26. In the circumstances of the case, I find no substance in the petition, the petition is therefore, rejected. Rule is discharged.

27. At this stage Mr. Sutrale, the learned counsel for the petitioner prays that the execution of the impugned decree be stayed for four months because the petitioner desires to approach the Supreme Court. The learned counsel for the respondent opposes. In the peculiar facts and circumstances of the case the impugned order is stayed for three months on the condition that the petitoner and all adult members of her family file an undertaking in this court within four weeks, that in case they do not get any favourable order from the Supreme Court, after the period of three mnonths they will handover vacant, peaceful and unencumbered possession of the suit premises to the respondent.

(SMT. RANJANA DESAI, J.)